Supreme Court, U.S.
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No. 96-1177

# IN THE SUPREME COURT
OF THE
# UNITED STATES

**October Term 1996**

**In re: ARGEREY CONSTANT,** *Petitioner*

**ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

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No. 96-1177

# IN THE SUPREME COURT
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# UNITED STATES

**October Term 1996**

**In re: ARGEREY CONSTANT,** *Petitioner*

**ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

## INTRODUCTION

David L. Ray, the Chapter 7 trustee in debtor James Constant's bankruptcy, submits this brief in opposition to Argerey Constant's petition for writ of mandamus. The petition should be denied on grounds of mootness and because it fails to satisfy any of the criteria for issuance of an extraordinary writ.

## STATEMENT OF THE CASE

### I. The Bankruptcy Proceeding and the Prior Adversary Action

This is not Mrs. Constant's first petition to this Court arising out of this bankruptcy proceeding. In a previous adversary action, trustee Ray sued Mrs. Constant to return to the bankruptcy estate 22 United States patents that her husband had fraudulently transferred to her on August 24, 1988, for purported consideration of $10.00, to frustrate Mr. Constant's judgment creditors. Trustee Ray prevailed against Mrs. Constant at trial of the adversary action, and the Bankruptcy Court for the Central District of California divested Mrs. Constant of her "entire right, title and interest" in the patents and ordered the patents returned to the bankruptcy estate for liquidation by the trustee. Judgment in Adversary Action ¶ 1 (App. 26, 27-28 ¶¶ 1 & 2); Order In Aid of Judgment Requiring Assignment of Patents (App. 29-31 ¶¶ 1-3); Assignment of Patents (App. 32).

Mrs. Constant and her husband appealed the adverse judgment in the adversary action to the Ninth Circuit. In that appeal, the Constants asserted the very same jurisdictional and patent law arguments that Mrs. Constant seeks to reassert in the present petition for mandamus. The Ninth Circuit rejected each of these arguments. *In re Constant*, No.

94-55053, slip op. (9th Cir. Sept. 12, 1994) (App. 34, 35 n.1, 39 ¶ 2). This Court denied the Constants' petition for writ of certiorari. 115 S. Ct. 729 (1995) (No. 94-782).

## II. Mrs. Constant's Purported Lien on the Patents

On August 19, 1992, while the adversary proceeding was still pending in the bankruptcy court, Mr. and Mrs. Constant purported to execute a "lien" and "writ of attachment" on, *inter alia*, the 22 patents which were the subject of the adversary action. This lien, made in favor of lienor Mrs. Constant, was purportedly based on Mr. Constant's pre-petition debt owed to Mrs. Constant. On January 19, 1993, Mr. Constant filed a notice of the "lien" and "writ of attachment" with the bankruptcy court in the adversary action.

The purported post-petition lien was plainly a further attempt by the Constants to defraud Mr. Constant's creditors. The lien was also nonsensical since it purported to grant Mrs. Constant a lien in the 22 patents which the Constants contended she already owned by virtue of the prior August 24, 1988 assignment from her husband. Notwithstanding the lien, the bankruptcy court entered judgment against Mrs. Constant in the adversary action divesting her of the "entire right, title and interest" in the 22 patents, and ordering the 22 patents returned to the estate. App. 26-33.

## III. The Bankruptcy Court's Order Approving the Sale of Patents

Having successfully returned the 22 patents to the estate, trustee Ray proceeded to liquidate the estate's assets. Pursuant to 11 U.S.C. § 363(b), trustee Ray moved the bankruptcy court for an order authorizing the trustee to sell the patents to a good faith purchaser for $15,000.00. Notice of the motion and proposed sale were provided to the Constants and the creditors, and an overbid procedure was set up whereby the creditors and others had the right to bid in excess of $15,000.00 for the patents.

Mr. and Mrs. Constant filed objections to the motion and the sale. The Constants' opposition to the sale did not dispute the trustee's assessment of the fairness of the $15,000.00 price for the patents. The Constants did not submit a competing bid for the patents. Instead, the Constants objected to the sale based on the same jurisdictional and patent law theories which the Ninth Circuit had expressly repudiated in the previous adversary action.

On June 13, 1995, there being no competing bids to purchase the patents, the bankruptcy court overruled the Constants' objections and authorized the trustee to sell the patents. In approving the sale, the bankruptcy court found the purchaser to be "a good faith purchaser under 11 U.S.C. section 363(m)" and the sale of the patents to be "in the best interests of the creditors of this estate." App. 15, 17 ¶ 6, 18 ¶ 11.

## IV. The Constants' Failure to Secure a Stay of the Sale of the Patents

On June 22, 1995, the Constants appealed the bankruptcy court's order to the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"). The Constants failed to post a bond or otherwise seek a stay of the bankruptcy court's order or of the sale itself pending such appeal. The Bankruptcy Code expressly requires such a stay to preserve the right to challenge the validity of the sale on appeal. 11 U.S.C. § 363(m). With no stay having been sought or issued, and the bankruptcy court having approved the sale, the trustee on July 11, 1995 executed the assignment of the patents to the good faith purchaser in exchange for receipt of $15,000.00. App. 41, 42 ¶¶ 2 & 3, 43-44.

The trustee notified the bankruptcy court and the BAP of the completed sale of the patents. App. 41, 45. Contrary to Mrs. Constant's assertion in her petition, this evidence of the completed sale became part of the record on appeal pursuant to order by the BAP. App. 19-20.

The BAP dismissed the Constants' appeal as moot. *In re Constant*, No. CC-95-1848-BaVH (Bankr. 9th Cir. May 16, 1996) (App. 21). The BAP based its decision both on the Constants' failure to obtain a stay of the sale of the patents and their failure to join the purchaser as a party on appeal. App. 24.

## V. The Constants' Attempted Appeal to the Federal Circuit

The Constants proceeded to appeal the BAP's decision. The Constants filed a notice of appeal purporting to direct the appeal to the Federal Circuit rather than to the Ninth Circuit, the regional Court of Appeals having jurisdiction of bankruptcy appeals from the Central District of

California. Apparently, the Constants wished to avoid the Ninth Circuit since it had already ruled against them in the adversary action on the very issues they sought to raise in their present appeal.

Mrs. Constant's attempt at appellate forum shopping was rebuffed by the Clerk of the BAP, who directed the appeal to the Ninth Circuit according to the established rules of Bankruptcy Procedure. The Ninth Circuit summarily affirmed on the basis that Mrs. Constant's failure to secure a stay of the sale of the patents, and to join the purchaser as a party on appeal, rendered her appeal moot. *In re Constant*, No. 96-56123 (9th Cir. Oct. 23, 1996) (Mrs. Constant's Petition, App. A). Mr. Constant has filed a separate, currently pending mandamus petition to this Court (No. 96-1178) challenging the Ninth Circuit's separate handling of his appeal.

## ARGUMENT

### I. Mrs. Constant's Petition Has Been Mooted by Her Failure to Stay the Sale of Patents and to Join the Purchaser on Appeal

Notwithstanding Mrs. Constant's many claims of error by the court below, her mandamus petition and the issues it seeks to raise have been mooted by her failure to stay the sale of the patents to the good faith purchaser. The Bankruptcy Code is clear: absent a stay pending appeal, the sale of the estate's property to a good faith purchaser cannot be undone even if the purchaser knew of the pendency of the appeal:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under

> such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). *See Ewell v. Diebert*, 958 F.2d 276, 282 (9th Cir. 1992) ("The Debtor's appeals are moot. Because the Buyer was a good faith purchaser, under 11 U.S.C. § 363(m) the sale may not be modified or set aside on appeal unless the sale was stayed pending appeal. It was not, and the court thus cannot grant any effective relief.").

Mrs. Constant's petition contends that her appeal is not moot because trustee's Ray sale of the patents was completed after she had filed her notice of appeal to the BAP. This argument is contrary to the plain language of 11 U.S.C. § 363(m), which expressly states that the purchaser's knowledge of "the pendency of the appeal" does not affect the validity of the sale.

Mrs. Constant also contends that evidence of the trustee's sale of the patents was not part of the record on appeal before the BAP. This argument ignores the BAP's order supplementing the record on appeal to include the evidence of the trustee's sale. App. 19-20. *See generally* Bank R. 8019 (vesting in BAP authority to suspend bankruptcy rules and to "order proceedings in accordance with its direction"). Mrs. Constant's further argument that the trustee should have designated mootness as an issue on appeal misreads Bankruptcy Rule 8006, which imposed on the appellant, not the trustee-appellee, the duty of filing a designation of issues on appeal. In any event, the BAP properly considered the subsequent sale which rendered the appeal moot and removed the Article III prerequisite that a live case or controversy exist. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987).

Mrs. Constant further argues that the inapplicable exceptions to 11 U.S.C. § 363(m) announced in *In re Mann*, 907 F.2d 923 (9th Cir. 1990), should be extended to the present case to permit her to appeal and raise federal statutory challenges to the trustee's sale without having secured a stay of the sale. Mrs. Constant's argument under *Mann* is improper for several reasons. First, *Mann* concerned a state foreclosure right of a real property owner, and its holding has no application to a Chapter 7 trustee's sale of property of the estate. Second, Mrs. Constant failed to cite the *Mann* decision to the courts below, and she should not now be heard to complain, in an extraordinary petition to this Court, that the courts below did not consider authorities and arguments that she had not presented to them.

In any event, Mrs. Constant fails to present a compelling argument to ignore the express statutory mandate of section 363(m) requiring a stay to challenge the validity of the sale on appeal. And even if Mrs. Constant's novel position were accepted, so that appeals were permitted to raise federal law challenges to the sale of the estate's assets without staying the sale, it would hardly help Mrs. Constant in the present case. As further described below, Mrs. Constant's federal patent law challenge to the sale of the patents is both without merit and is precluded, under the doctrines of res judicata and collateral estoppel, by the courts' prior rejection of the argument.

Finally, in addition to Mrs. Constant's failure to obtain a stay of the trustee's sale, a separate ground for mootness exists: Mrs. Constant's failure to name the purchaser as a party to the appeal. *See In re Royal Properties, Inc.*, 621 F.2d 984, 986-87 (9th Cir. 1980) (rejecting as moot an appeal from bankruptcy court order approving sale of property to non-party -- even if purchaser

were not a good faith purchaser, no relief could be granted vis-a-vis non-party).

The mootness of Mrs. Constant's petition divests this matter of the live case or controversy prerequisite of Article III of the Constitution. *Burke*, 479 U.S. at 363. Accordingly, the petition should be dismissed. *See, e.g., In re Vasquez*, 506 U.S. 914 (1992) (dismissing mandamus petition on mootness grounds).

## II. Mrs. Constant's Petition May Not Challenge Prior Adverse Decisions

In addition to being moot, Mrs. Constant's petition also improperly seeks to relitigate the prior, fully litigated adverse decision in the adversary action. Mrs. Constant has previously unsuccessfully appealed this matter to the Ninth Circuit, and this Court has denied her petition for writ of certiorari. *In re* Constant, No. 94-55053, slip op. (9th Cir. Sept. 12, 1994) (App. 34, 35 n.1, 39 ¶ 2), *cert. denied*, 115 S. Ct. 729 (1995) (No. 94-782). Pursuant to Supreme Court Rule 20(1), a petition for mandamus must show, *inter alia*, that it is "in aid of the Court's appellate jurisdiction" and "that adequate relief cannot be obtained in any other form or from any other court." Since the Court previously had jurisdiction of this matter and denied review, mandamus is inappropriate. *See Ex Parte Morgan*, 114 U.S. 174, 175 (1885) ("If there is error in the judgment as rendered it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal.").

Further, Mrs. Constant's attempted relitigation of this matter is clearly precluded by the doctrines of res judicata and collateral estoppel. In the prior adversary action, Mrs. Constant lost on the issues relating to the jurisdiction of the bankruptcy court over the patents, her patent law theories, and her alleged interest in the patents. Mrs. Constant cannot

now relitigate these matters. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979) (party who loses issue in prior lawsuit after having had a "full and fair" opportunity to litigate it is precluded by collateral estoppel from rearguing issue in subsequent lawsuit); *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (res judicata bars relitigation of all claims and defenses that were previously available between the parties in prior lawsuit regardless whether or not they were asserted).

## III. No Error Was Committed by the Court Below

In addition to being moot and procedurally barred, the petition also fails to demonstrate "exceptional circumstances" warranting the Court's exercise of its discretionary powers to issue the extraordinary writ. Sup. Ct. R. 20(1). The Court's issuance of the extraordinary writ "is not a matter of right, but of discretion sparingly exercised." *Id.* In the present case, the petition fails to show any error by the court below, let alone extraordinary circumstances justifying a writ.

Mrs. Constant's contention that the bankruptcy court lacked jurisdiction over this matter is baseless. The bankruptcy court plainly had jurisdiction of the original adversary action between trustee Ray and Mrs. Constant, which was a "core" proceeding under the Bankruptcy Code wherein the trustee returned to the bankruptcy estate the 22 patents that Mr. Constant had previously fraudulently transferred to his wife. 11 U.S.C. § 544(b); 28 U.S.C. §§ 157(b)(1), 157(b)(2)(H), 1334. Likewise, the bankruptcy court plainly had jurisdiction to approve the sale of the patents once they had been returned to the bankruptcy estate. 11 U.S.C. § 363(b)(1); 28 U.S.C. §§ 157(b)(1), 157(b)(2)(A), (O), 1334. The fact that Mrs. Constant asserted a legally baseless patent law objection against the sale of the patents did not convert this bankruptcy action into one arising under the patent laws. *Cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988) ("a case

raising a federal patent-law defense does not, for that reason alone, 'arise under' patent law, 'even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.'").

Mrs. Constant's contention that she had a right to appeal the bankruptcy court's order approving the sale of patents to the Federal Circuit, rather than to the Ninth Circuit, is likewise baseless. Since, as shown above, original jurisdiction of this bankruptcy proceeding existed under the bankruptcy laws, appellate jurisdiction properly resided in the Ninth Circuit as the regional court of appeals. 28 U.S.C. §§ 158(d), 1291. Appellate jurisdiction did not exist in the Federal Circuit, since the action did not arise under the patent laws. 28 U.S.C. §§ 1291, 1295(a)(1), 1338(a).

Mrs. Constant's previously rejected patent law theory, that the assignment provisions of the patent laws (35 U.S.C. § 261) somehow prevented the bankruptcy court's disposition of the patents, is also baseless. Nothing in the patent laws prevented the bankruptcy court's straight-forward application of California's Uniform Fraudulent Transfer Act in the adversary action to avoid Mr. Constant's fraudulent transfer of his patents to his wife. *See* 11 U.S.C. § 544(b) (authorizing trustee to avoid transfers voidable under "applicable law"). The assignment provisions of the patent laws merely provide that "[a]n assignment . . . shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded" in the Patent Office. 35 U.S.C. § 261. In any event, as previously ruled by the Ninth Circuit in the adversary action, these provisions would not be implicated in the present case since the bankruptcy court had "explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents." *In re Constant*, No. 94-55053, slip op. (9th Cir. Sept. 7, 1994) (App. 34, 39 ¶ 2), *cert. denied*, 115 S. Ct. 729 (1995).

As this Court held in *Allen v. Riley*, 203 U.S. 347 (1906), the patent laws' assignment provisions leave the states with "the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud." *Id.* at 355. "[Congress] has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee." *Id.* at 356.[1]

Finally, Mrs. Constant's lien argument is baseless. Mrs. Constant lost all interest in the patents in the prior adversary action, which divested her of "the entire right, title and interest" in the 22 patents. App. 26-33. *See generally Landwehr v. DuPree*, 72 F.3d 726, 738 (9th Cir. 1995) ("an equitable lien creates an *interest* in property") (emphasis added). Mrs. Constant's assertion of this purported lien in her subsequent appeal was therefore improper. In any event, Mrs. Constant's purported *post*-petition lien was clearly not a "pre-existing interest" as claimed by Mrs. Constant, and it could not have had any effect since Mrs. Constant had already been assigned the 22 patents by her husband prior to the lien's creation.

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[1] Mrs. Constant's citation to *In re Peregrine*, 116 Bankr. 194 (C.D. Cal. 1990), is unavailing. That decision had nothing to do with fraudulent transfers or this case, and did not purport challenge this Court's explicit language in *Allen* regarding the states' power to make reasonable regulations concerning the assignment of patents and the protection against fraud.

## CONCLUSION

Mrs. Constant's petition for mandamus simply repeats the same frivolous arguments that she lost in the earlier adversary action and in her previous petition to this Court for writ of certiorari. Even if Mrs. Constant's petition were not mooted by her failure to obtain a stay of the trustee's sale of the patents and to join the purchaser on appeal, there would be no basis for upsetting the decision of the lower court. Trustee Ray respectfully requests that the petition be denied.

Dated: February 26, 1997 Respectfully submitted,

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Trustee David L. Ray

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# APPENDIX

## APPENDIX

### Opinions, Orders and Judgments

Order of U.S. Bankruptcy Court Approving Trustee's Sale of U.S. Patents, dated June 8, 1995.....15

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**[FILED JUNE 8, 1995]**

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| In re | ) | Case No. LA 89-19270-KL |
| | ) | Chapter 7 |
| JAMES CONSTANT, | ) | |
| | ) | ORDER APPROVING |
| Debtor | ) | TRUSTEE'S SALE OF |
| | ) | UNITED STATES |
| | ) | PATENTS |
| | ) | |
| | ) | DATE: June 8, 1995 |
| | ) | TIME: 10:00 a.m. |
| | ) | CTRM: 1339 |
| | ) | 255 E. Temple St. |
| _____ | ) | Los Angeles, CA |

The hearing on the Chapter 7 Trustee's Motion for Order Approving the Sale of United States Patents was held on June 8, 1995 at 10:00 a.m., in Courtroom 1339, located at 255 E. Temple Street, Los Angeles, California. Gordon P.

Stone, III appeared on behalf of David L. Ray, the Chapter 7 Trustee. All other appearances are duly noted in the Court record.

After reviewing the Notice of Motion, the Motion and all evidence set forth therein and appended thereto, the Debtor's AND Argerey Constant's Opposition, and any and all arguments made at the time of hearing, and finding that notice of the Motion was timely and properly given, and there being no other bidders at the sale, and that good cause exists for the Motion, the Court hereby orders as follows:

1. IT IS HEREBY ORDERED that the Motion for Order Approving Sale of United States Patents ("the Motion") is granted in its entirety.

2. IT IS FURTHER ORDERED that the Trustee's sale of the following twenty-two (22) United States Patents ("the Patents"), personal property of the bankruptcy estate of the above-entitled debtor, for the sum of $15,000.00 cash to Advanced Micro-Devices, Inc. is approved.

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,998,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481

United States Patent No. 4,156,919
United States Patent No. 4,165,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

A true and correct copy of the Agreement for Sale, Purchase and Assignment of United States Patents is attached to the Motion and is incorporated herein by this reference.

3. IT IS FURTHER ORDERED that the Trustee is authorized to execute any and all documents and take all acts necessary to carry out the terms of the sale.

4. IT IS FURTHER ORDERED that there are no known encumbrances on the Patents and the Patents are sold free and clear to Advanced Micro-Devices, Inc., Advanced Micro-Devices having waived any right, title or interest it may have in the proceeds of the sale of the Patents.

5. IT IS FURTHER ORDERED that notice of the Motion was sent to all known creditors and parties-in-interest in this case pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. This Notice advised the recipient of the appropriate procedure to oppose this Motion or overbid on the Patents.

6. IT IS FURTHER ORDERED that the sale of the Patents will benefit and is in the best interests of the creditors of this estate.

7. IT IS FURTHER ORDERED that the overbidding procedure as outlined in the Notice and the Motion was, in all respects, proper under the applicable provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. No overbids were received pursuant to this procedure or at the hearing on the Motion when called for by the Court.

8. IT IS FURTHER ORDERED that this Court has jurisdiction over the authorization of the sale of the Patents pursuant to 28 U.S.C. Sections 157(a) and 1334(a) and (d).

9. IT IS FURTHER ORDERED that the sale, including the hearing thereon, constitutes a core proceeding within the meaning of 28 U.S.C. Section 157(b)(2).

10. IT IS FURTHER ORDERED that the applicable bankruptcy code section governing the Trustee's right to sell the Patents is 11 U.S.C. Section 363.

11. IT IS FURTHER ORDERED that Advanced Micro-Devices, Inc. constitutes and is a good faith purchaser under 11 U.S.C. section 363(m).

12. IT IS FURTHER ORDERED that the sale of the Patents is devoid of any express or implied warranty, including, but not limited to fitness, condition, or use. Additionally, the Trustee has made and makes no representations, warranties, or covenants regarding the sale. This sale is on an "as is, where is" basis.

DATED: June 8, 1995 KATHLEEN T. LAX
United States Bankruptcy Judge

**[FILED NOVEMBER 8, 1995]**

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

| | | |
|---|---|---|
| In re | ) | BAP No. CC-95-1848 |
| JAMES CONSTANT, | ) | Bankruptcy No. LA89-19270-KL |
| Debtor. | ) | |
| | ) | ORDER |
| ARGEREY CONSTANT, JAMES CONSTANT, | ) | |
| Appellants, | ) | |
| v. | ) | |
| DAVID L. RAY, | ) | |
| Appellee. | ) | |

Before: OLLASON, MEYERS, and HAGAN,

Bankruptcy Judges.

The panel has received and reviewed appellee's motions to: 1) supplement the record on appeal; 2) extend the time to file his brief; and 3) dismiss this appeal as moot. Appellants' response has been reviewed as well as appellee's reply to the response.

The motion to supplement the record on appeal is hereby ORDERED GRANTED. The motion for an extension of time to file appellee's brief is hereby ORDERED GRANTED. The brief and supplemented excerpts of record, received on October 10, 1995, will be considered timely filed.

The motions panel defers ruling on the motion to dismiss at this time until a merits panel is assigned to this appeal. The motion to dismiss will be considered by the merits panel.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | |
|---|---|---|
| In re | ) | BAP No. CC-95-1848-BaVH |
| | ) | |
| JAMES CONSTANT, | ) | BK No. LA89-19270 KL |
| | ) | |
| Debtor. | ) | |
| | ) | |
| JAMES CONSTANT and ARGEREY CONSTANT | ) | |
| | ) | MEMORANDUM |
| Appellants, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DAVID L. RAY, Chapter 7 Trustee, | ) | |
| | ) | |
| Appellee. | ) | |

Submitted without Oral Argument February 22, 1996
at Pasadena, California

Filed - MAY 16 1996

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Kathleen T. Lax, Bankruptcy Judge, Presiding
Before: BAUM,[1] VOLINN and HAGAN, Bankruptcy Judges.

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[1] The Honorable Redfield T. Baum, Bankruptcy Judge from the District of Arizona, sitting by designation.

Debtor appeals the court's order approving the sale of approximately twenty patents. Prior to reaching the merits of the appeal this Panel has considered the Trustee's motion to dismiss for mootness. For the reasons stated below, this appeal is dismissed as moot.

## FACTUAL BACKGROUND

James Constant ("Debtor") was the owner of some twenty-two patents. On August 24, 1988, Debtor transferred the patents to his wife, Argerey Constant ("Argerey") for a stated consideration of $10.00. On September 13, 1989, Debtor filed for Chapter 11 relief. His case was later converted to Chapter 7 and David Ray ("Trustee") was appointed trustee. Trustee commenced an adversary action to set aside the transfer of the patents as a fraudulent pre-petition conveyance. The bankruptcy court ruled in favor of the Trustee and set aside the transfer. The patents then became property of the estate.

On February 15, 1995, the Trustee was approached by Advanced Micro-Devices, Inc. ("AMD") with an offer to purchase the patents. AMD had previously obtained a judgment lien on the personal property of the Debtor. AMD entered into a written agreement with the Trustee whereby AMD would purchase the twenty-two patents in exchange for $15,000 and AMD's waiver of its rights as a judgment creditor.

On May 18, 1995, the Trustee filed a Motion for Order Approving Sale of Personal Property. The Motion included the sales price and provided an overbid procedure whereby interested parties were provided an opportunity to submit a bid in excess of the $15,000 selling price. Both the Debtor and Argerey objected to the sale arguing that the Trustee had not recorded the transfer of the patents to himself and thus he could not transfer them. The Constants

also argued that AMD could not be a bone fide purchaser in good faith because it was a judgment creditor.

The bankruptcy court overruled the objections and approved the sale by order dated June 13, 1995. There had been no other offers to purchase the patents. The court expressly found that AMD was a good faith purchaser and that the sale was in the best interest of the creditors. Both the Debtor and Argerey have appealed the court's order. The Trustee has filed a motion to dismiss the appeal as moot based on the fact that the Constants failed to seek a stay pending appeal and AMD was not made a party to the appeal.

## ISSUE

Whether not having sought a stay and failure to join AMD as a party renders the appeal of the bankruptcy court's order moot.

## STANDARD OF REVIEW

Mootness is a Jurisdictional issue which is to be reviewed de novo. In re Baker & Drake. Inc., 35 F.3d 1348, 1351 (9th Cir. 1994).

## DISCUSSION

The judicial doctrine of mootness developed from the general rule that the occurrence of events which prevents an appellate court from granting effective relief renders an appeal moot. See Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985). The mootness rule applies in bankruptcy when the debtor fails to obtain a stay of an order approving the sale of the debtor's assets. In re Ewell, 958 F.2d 276 (9th Cir. 1992); In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988); In re Royal Properties. Inc., 621 F.2d 984 (9th Cir. 1980).

Section 363(b)(1) of the Code gives the trustee, after notice and a hearing, authority to "use, sell, lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1) (1985). The rights of good faith purchasers of property of the estate are protected by section 363(m). Ewell at 278. Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. S 363(m) (1985). Here, because the sale has been completed and the Debtor failed to obtain a stay pending appeal, the validity of the sale cannot be affected on appeal. Therefore, this court cannot grant effective relief.

Further, an appellate court cannot grant effective relief if the purchasers of the property have not been made parties to the appeal. Royal Properties at 987. Where the sale of the property has already been completed and the purchaser is not a party to the appeal, those transfers cannot be voided or rescinded by the court. Id. at 986, citing In re Combined Metals Reduction Co., 557 F.2d 179, 190 (9th Cir. 1977). The Debtor failed to join the purchaser (AMD) as a party to the appeal, further preventing this panel from granting effective relief.

## CONCLUSION

This appeal is moot and is therefore DISMISSED.[2]

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[2] The appellee, in his brief, has requested an award of sanctions for attorney fees and costs. There has been no formal motion filed for sanctions in this matter. This panel has no authority to award sanctions under these circumstances. In re Sandoval, 186 B.R. 490, 496 (9th Cir. BAP 1995).

**[FILED MARCH 9, 1993]**

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Special Counsel for Trustee
David L. Ray

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| In re: | |
| JAMES CONSTANT, | CHAPTER 7 |
| | Case No. LA 89-19270 KL |
| | Adv. Case No. LA91-06842-KL |
| DAVID L. RAY, Chapter 7 Trustee, | |

| | | |
|---|---|---|
| | ) | JUDGMENT |
| Plaintiff, | ) | |
| | ) | Trial Date: 11/9/92 |
| vs. | ) | Time: 9:00 a.m. |
| | ) | Ruling Date: 11/10/92 |
| ARGEREY CONSTANT, an | ) | Time: 9:30 a.m. |
| individual, | ) | Courtroom: 1339 |
| | ) | Judge: Hon. Kathleen |
| Defendant. | ) | Lax |
| | ) | |

In accordance with the findings of fact and conclusions of law signed by the Court after trial on March 9, 1993, and entered thereof,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that:

1. The August 24, 1988 assignment by James Constant to Argerey Constant of the following 22 United States Letters Patent (hereinafter "Patents") is hereby avoided:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481

United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930.

All of the Patents are the property of the bankruptcy estate and shall be subject to disposition by Chapter 7 Trustee David L. Ray in accordance with the United States Bankruptcy Code and Rules.

2. Defendant Argerey Constant and all persons in active concert or participation with her (including without limitation James Constant) are permanently enjoined from assigning, transferring, dedicating to the public, licensing, encumbering, or otherwise disposing of any of the Patents.

3. The Court shall retain jurisdiction of this action and the parties to (i) issue such attachments or such other orders as may be necessary to aid in execution of this Judgment and to secure recovery of the Patents by Trustee Ray, and (ii) hear and determine Trustee Ray's applications for the award of fees, costs and expenses in this action.

This judgment constitutes the final judgment of this action and shall be entered forthwith by the Clerk of the Court.

Dated: March 9, 1993

KATHLEEN T. LAX
UNITED STATES
BANKRUPTCY JUDGE

**[FILED MARCH 9, 1993]**

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Special Counsel for Trustee
David L. Ray

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| In re: | ) | |
| | ) | CHAPTER 7 |
| JAMES CONSTANT, | ) | |
| | ) | Case No. LA 89-19270 KL |
| | ) | |
| | ) | Adv. Case No. LA91-06842-KL |
| DAVID L. RAY, Chapter 7 Trustee, | ) | |

| | | |
|---|---|---|
| | ) | ORDER IN AID OF |
| Plaintiff, | ) | JUDGMENT |
| | ) | REQUIRING |
| vs. | ) | ASSIGNMENT OF |
| | ) | PATENTS |
| ARGEREY CONSTANT, an | ) | |
| individual, | ) | Trial Date: 11/9/92 |
| | ) | Time: 9:00 a.m. |
| Defendant. | ) | Ruling Date: 11/10/ |
| | ) | 92 |
| | | Time: 9:30 a.m. |
| | | Courtroom: 1339 |
| | | Judge: Hon. Kathleen |
| | | Lax |

This action having been tried to the Court, the Court having rendered its findings of fact and conclusions of law and the following order being necessary to aid the execution of the Court's previous findings, conclusions, orders and judgment,

IT IS HEREBY ORDERED:

1. The U.S. Patents listed immediately below are hereby assigned to the Ch. 7 Trustee in this bankruptcy case, David L. Ray:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572

United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930.

2. Within ten (10) days of entry of this Order, Defendant Argerey Constant (i) shall execute an assignment of the above patents to the U.S. Trustee in the form attached as Exhibit A hereto; (ii) shall have such assignment notarized; and (iii) shall deliver such notarized assignment to Trustee Ray with copy to his counsel.

3. If Mrs. Constant fails to so execute, have notarized, and deliver the assignment to the Ch. 7 Trustee within ten (10) days of the date of entry of this Order, the Clerk of this Court is ordered to execute such assignment and such assignment shall have the same force and effect as if executed by Mrs. Constant and shall be binding upon Mrs. Constant, her heirs and her actual or purported assignees.

Dated: March 9, 1993

Kathleen Lax
United States Bankruptcy
Judge

**ASSIGNMENT OF UNITED STATES LETTER PATENTS**

Whereas I, Argerey Constant, residing at 1603 Danbury Drive, in the City of Claremont, County of Los Angeles, and State of California, am the record title holder of the following Letter Patents of the United States:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

I, Argerey Constant, hereby assign to the Chapter 7 Trustee, David L. Ray, the entire right, title and interest, in and to each of the above-referenced Letters Patents to the full end of the term for which said Letters Patents are granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed this 1st day of June, 1993, at Los Angeles, California.

ARGEREY CONSTANT

FRED E. GOODROE
Frank E. Goodroe,
Clerk of Court

United States Bankruptcy Court
Central District of California

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| In re: JAMES CONSTANT | ) | No. 94-55053 |
| | ) | |
| Debtor. | ) | D.C. No. 93-04392-AWT |
| DAVID L. RAY, SALZBURG, RAY & BERGMAN, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ARGEREY CONSTANT; JAMES CONSTANT, | ) | MEMORANDUM* |
| | ) | |
| Defendants-Appellants. | ) | |

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted September 7, 1994**
Filed September 12, 1994

Before: HALL, WIGGINS, and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Chapter 7 debtor James Constant and his wife, Argerey Constant, appeal pro se the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs. Constant's appeal from certain bankruptcy court decisions for lack of jurisdiction, and (2) sanction award. We have jurisdiction under 28 U.S.C. § 158(d),[1] and we affirm.

I

Standing

Mr. Constant contends that the district court erred by not reaching the merits of his appeal on the ground that he lacked standing to appeal. We disagree.

Mr. Constant relies on Justice Stevens's dissenting opinion in Martin v. Wilks for the proposition that interested third parties who have no right to appeal from a final judgment nevertheless may collaterally attack the judgment. See 109 S. Ct. 2180, 2189 (1989) (Stevens, J., dissenting). Although a third party may under certain circumstance be able to collaterally attack a judgment, see, e.g., Wells Fargo & Co. v. Taylor, 254 U.S. 175, 184 (1920), a third party whose motion to intervene is denied is not a party and may

[1] We reject the Constants' contention that because the district court dismissed their appeal on standing and jurisdictional grounds, the district court's decision was not final and appealable. See McGuckin v. Smith, 974 F.2d 1050, 1053 (9th Cir. 1992) (dismissals based on lack of jurisdiction are final and appealable). We also reject the Constants' contention that the bankruptcy and district courts lacked subject-matter jurisdiction over the trustee's action to recover fraudulently conveyed patents from Mrs. Constant, and the Constants' appeal from the final judgment in that action. See 28 U.S.C. §§ 157(b) (1) (bankruptcy judge may hear and determine core proceeding), 157(b) (2) (H) (action to recover fraudulent conveyance is core proceeding), 158(a) (district courts have jurisdiction to hear appeals from final judgments of bankruptcy judges).

not appeal directly any subsequent decision, see Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524 (1947); see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987). Moreover, in the bankruptcy context, "[o]nly those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have" standing to appeal the order. Tilley v. Vucurevich (In re Pecan Groves), 951 F.2d 242, 245 (9th Cir. 1991).

Here, Mr. Constant's motion to intervene was denied. He therefore was not a party to the adversary proceeding. See Brotherhood, 331 U.S. at 524. Moreover, he has conceded that he had no interest in the patents that were the subject of the adversary proceeding. Thus, he did not have standing to appeal directly the bankruptcy court's decisions to the district court. See id.; In re Pecan Groves, 951 F.2d at 245.

II
District Court's Jurisdiction

Mrs. Constant appealed three bankruptcy court "decisions" to the district court: (1) the March 12, 1993 judgment avoiding as fraudulent Mr. Constant's transfer of certain patents to his wife; (2) the March 15, 1993 order in aid of judgment, directing Mrs. Constant to assign the patents within ten days or the clerk would do so; and (3) the bankruptcy clerk's June 1, 1993 assignment of the patents. The district court concluded that the June 1, 1993 assignment was not an appealable order and that Mrs. Constant's appeal of the other bankruptcy court decisions was untimely. "The timeliness of a notice of appeal is a question of law which we review de novo." Delaney v. Alexander (In re Delaney), No. 93-16217, slip op. 7817, 7819 (9th Cir. July 15, 1994) (per curiam).

First, district courts "have jurisdiction to hear appeals from final judgments, orders, and decrees, and . . . interlocutory orders and decrees, of bankruptcy judges." 28 U.S.C. § 158(a). Here, the June 1, 1993 assignment was not a judgment, order, or decree. Moreover, it was executed by the court clerk, not the bankruptcy judge. Thus, the district court did not err by concluding it was not an appealable order. See id.

Second, a notice of appeal from the bankruptcy court must be filed with the clerk within ten days from the date of entry of the order appealed from. Bankr. R. 8002(a). "The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order." Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994).

Here, Mrs. Constant filed her notice of appeal on June 8, 1993. Because the notice was not filed within ten days of either the March 12, 1993 judgment or the March 15, 1993 order, the district court properly found it untimely. See Bankr. R. 8002(a).

## III
## District Court Sanctions

The Constants contend that the district court erred by sanctioning them for filing a frivolous appeal under Fed. R. Civ. P. 11 and Bankr. R. 9011(a) because (1) the sanctions were not based on pleadings signed by the Constants, and (2) the district court never reached the merits of their appeal. We disagree.

A district court reviewing a decision of a bankruptcy court does not have the authority to impose sanctions under

Rule 11, see Akros Installations, Inc. v. Grand Nat'l Bank (In re Akros Installations, Inc.), 834 F.2d 1526, 1531 (9th Cir. 1987), but may impose sanctions under the bankruptcy equivalent to Rule 11, Bankr. R. 9011,[2] see Hedges v. RTC, Nos. 92-16952, 93-15606, slip op. 7713, 7719-20 (9th Cir. July 14, 1994) (per curiam). A court may sanction the signers of a pleading or other paper where the paper is frivolous, meaning it is baseless and done without reasonable inquiry. In re Grantham Bros., 922 F.2d at 1441.

Here, contrary to their contention, the Constants signed the notice of appeal and appellants' brief submitted to the district court. Thus, the district court had authority to sanction them for filing a frivolous appeal. See Bankr. R. 9011.

With respect to Mr. Constant, a reasonable inquiry would have revealed that he lacked standing to appeal because it was clear he was not a party to the adversary proceeding and thus, had no basis to appeal. See Brotherhood, 331 U.S. at 524; see also Oil & Gas Co. v. Duryee, 9 F.3d 771, 773 (9th Cir. 1993) (sanctioning a putative appellant who lacked standing to file bankruptcy petition); cf. Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (reversing sanction award where whether party lacked standing had "not been authoritatively decided by this court"). Accordingly, Mr. Constant's appeal was frivolous. See In re Grantham Bros., 922 F.2d at 1442.

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[2] Rule 11 recently was amended to remedy problems arising from certain 1983 amendments to the rule. See Fed. R. Civ. P. 11 (as amended Apr. 22, 1993, eff. Dec. 1, 1993) & advisory committee notes to 1993 amendments. Bankr. R. 9011 is "virtually identical" to the pre-1993 version of Rule 11. See Valley Nat'l Bank v. Needler (In re Grantham Bros.), 922 F.2d 1438, 1441 (9th Cir.), cert. denied, 112 S. Ct. 94 (1991).

As to Mrs. Constant, the fact that the district court lacked jurisdiction to consider the merits of her appeal did not preclude it from imposing sanctions. See Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797, 801 (9th Cir. 1986); see also Willy v. Coastal Corp., 112 S. Ct. 1076, 1080-81 & n.5 (1992). First, Mrs. Constant argued that the bankruptcy court's judgment violated 28 U.S.C. § 1962 because patents are intangible property with no situs in any state. Section 1962 is not applicable. See 28 U.S.C. § 1962. Moreover, the bankruptcy court had authority to enforce its judgment by directing Mrs. Constant to assign her interest in the patent. See Bankr. R. 7069; Fed. R. Civ. P. 69(a) (enforcement of judgments shall be in accordance with state procedures); Cal. Civ. Proc. Code §§ 695.010 (all property of judgment subject to enforcement), 697.510(a) (judgment lien on personal property), 700.170 (levy on general intangibles).

Second, Mrs. Constant argued that the bankruptcy court's judgment violated 35 U.S.C. § 261 because she was the proper assignee of the patents. The bankruptcy court, however, explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents. See 11 U.S.C. § 544; Cal. Civ. Code §§ 3439.04, 3439.05. Thus, Mrs. Constant's assignment could not have "trumped" that of the trustee's.

Finally, Mrs. Constant's argued that the trustee's motion for sanctions violated Fed. R. Civ. P. 41(b) because the bankruptcy court already ordered the employment and compensation of certain attorneys for the benefit of the estate. An award of sanctions, however, punishes a party for filing a frivolous action, and does not compensate directly the other side's attorney. See Willy, 112 S. Ct. at 1081.

Based on our review of the Constants' pleadings, the district court did not abuse its discretion by sanctioning the Constants. See Hedges, slip op. at 7720 (reviewing for abuse of discretion).

## IV
## Appellate Sanctions

The appellee requests that this court impose sanctions against the Constants for filing a frivolous appeal. This court has discretion to impose sanctions for bringing a frivolous appeal, even where a litigant is pro se. 28 U.S.C. § 1912; Fed. R. App. P. 38; Urban v. Commissioner, 964 F.2d 888, 890 (9th Cir. 1992) (per curiam). As appeal is frivolous "if the result is obvious, or the arguments of error are wholly without merit." Wilcox v. Commissioner, 848 F.2d 1007, 1009 (9th Cir. 1988). This court does not impose sanctions lightly as it is aware that an appeal that lacks merit is not always frivolous. Grimes v. Commissioner, 806 F.2d 1451, 1454 (9th Cir. 1986) (per curiam).

Because the Constants' appeal is without merit, we impose sanctions of $1,000. See id.

**AFFIRMED.**

**[FILED: SEPTEMBER 18, 1995]**

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Attorneys for DAVID L. RAY, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| In re | ) | Bankruptcy Case No. LA 89-19270 KL |
| JAMES CONSTANT, | ) | Chapter 7 |
| Debtor. | ) | DECLARATION OF CHAPTER 7 TRUSTEE DAVID L. RAY RE ASSIGNMENT OF PATENTS TO ADVANCED MICRO DEVICES, INC. |

## DECLARATION OF DAVID L. RAY

## RE ASSIGNMENT OF PATENTS TO ADVANCED MICRO DEVICES, INC.

I, David L. Ray, declare:

1. I am the duly qualified and acting Chapter 7 Trustee in the bankruptcy case In re James Constant ("Debtor"), appointed on or about June 27, 1990. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto.

2. On July 11, 1995, acting as trustee in the aforementioned bankruptcy case and having received $15,000.00 consideration therefor, I assigned to Advanced Micro Devices, Inc. the 22 United States patents returned to the bankruptcy estate as a result of the adversary proceeding (No. LA 91-06842-KL) against Argerey Constant. Attached as Exhibit 1 is a true and correct copy of the assignment.

3. At no time has either James or Argerey Constant sought to obtain a stay either of the bankruptcy court's Order Approving Trustee's Sale of United States Patents (entered June 13, 1995) or of the actual sale itself.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of September 1995, at Hilton Head, South Carolina.

David L. Ray
Chapter 7 Trustee

# ASSIGNMENT OF UNITED STATES LETTER PATENTS

WHEREAS, I, David L. Ray, am the Chapter 7 Trustee ("Trustee") for the bankruptcy estate of In re James Constant, Case No. LA 89-19270-KL;

WHEREAS, under the United States Bankruptcy Laws, and pursuant to an order of court further described below and appended hereto, the bankruptcy estate of In re James Constant is the owner of the entire right, title and interest in and to the following United States Letter Patents:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
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United States Patent No. 4,117,481
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United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

(hereinafter "Patents");

WHEREAS, the fraudulent August 24, 1988 assignments by James Constant to Argerey Constant of the above Patents were avoided, and all of the Patents were confirmed the property of the bankruptcy estate and subject to disposition by me, the Trustee, pursuant to United States Bankruptcy Judge Kathleen Lax's March 9, 1993 Judgment (attached hereto as Exhibit A), and in accordance with the United States Bankruptcy Code and Rules;

Pursuant to United States Bankruptcy Judge Kathleen Lax's June 8, 1995 Order Approving Trustee's Sale of United States Patents (attached hereto as Exhibit B), and for good and valuable consideration, receipt of which is hereby acknowledged, David L. Ray, Chapter 7 Trustee, having a place of business at 10960 Wilshire Boulevard, Tenth Floor, Los Angeles, California, hereby sells, assigns, and transfers to Advanced Micro Devices, Inc., a Delaware corporation having a place of business at 1 AMD Place, Sunnyvale, California 94088-3453 and its successors and assigns, the entire right, title and interest, throughout the world in and to each of the above-referenced U.S. Letter Patents.

Executed this 11th day of July, 1995, at Los Angeles, California.

DAVID L. RAY, CHAPTER 7 TRUSTEE

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Attorneys for DAVID L. RAY, Chapter 7 Trustee

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

| | | |
|---|---|---|
| In re | ) | Bankruptcy Case No. LA 89-19270 KL |
| JAMES CONSTANT, | ) | BAP No. CC-95-1848 |
| Debtor. | ) | Chapter 7 |
| | ) | MOTION OF CHAPTER 7 TRUSTEE DAVID L. RAY TO SUPPLEMENT RECORD ON APPEAL |

Chapter 7 Trustee David L. Ray respectfully requests leave to supplement the record in the above-captioned appeal to include the attached September 18, 1995 declaration of David L. Ray (with exhibit), which was lodged in the bankruptcy court on September 19, 1995. This supplementation is necessary to provide the Court with a complete record on appeal, and specifically to provide the

Court with evidence of the July 11, 1995 assignment of patents to AMD. As demonstrated by the motion to dismiss filed concurrently by Trustee Ray, this completed assignment of patents establishes the mootness of the Constants' present appeal.

Dated: September 21, 1995

SALTZBURG, RAY & BERGMAN

By: GORDON P. STONE, III
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## STATUTES AND RULES

The following is the pertinent text of the statutes and rules involved in this case:

**11 U.S.C. § 363(b)(1), (m)**

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

**11 U.S.C. § 544(b)**

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

**28 U.S.C. § 157(b)(1), b(2)(A), (H), (O)**

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate

orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-- . . . .

(A) matters concerning the administration of the estate; . . . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances. . . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

**28 U.S.C. § 158(d)**

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

**28 U.S.C. § 1291**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**28 U.S.C. § 1295(a)(1)**

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title . . . .

**28 U.S.C. § 1334(a), (b), (e)**

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11 . . . .

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

. . . .

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

**28 U.S.C. § 1338(a)**

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

**35 U.S.C. § 261**

. . . .

An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

**Supreme Court Rule 20(1)**

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

**Bankruptcy Rule 8006**

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b),

whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

**Bankruptcy Rule 8019**

In the interest of expediting decision or for other cause, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, and except Rules 8001, 8002 and 8013, and may order proceedings in accordance with its direction.